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8  
9 **UNITED STATES DISTRICT COURT**  
10 **DISTRICT OF NEVADA**

11 7912 LIMBWOOD COURT TRUST, a Nevada  
12 Trust

13 Plaintiff,

14 vs.

15 WELLS FARGO BANK, N.A., a National  
Association; MTC FINANCIAL INC. dba  
16 TRUSTEE CORPS, a foreign corporation;  
REPUBLIC SERVICES, INC., a Foreign  
17 Corporation; SANDRA J. NEWTON,  
individually; SONYA D. NEWTON,  
18 individually; DOES I through X; and ROE  
CORPORATIONS I through X, inclusive,

19 Defendants.  
20

Case No.: 2:13-cv-00506-PMP-GWF

**PLAINTIFF'S OPPOSITION TO  
DEFENDANT, WELLS FARGO BANK,  
N.A.'s MOTION TO DISMISS WITH  
PREJUDICE THE PLAINTIFF'S  
COMPLAINT AND COUNTERMOTION  
FOR SUMMARY JUDGMENT**

21 Plaintiff 7912 Limbwood Court Trust ("Plaintiff"), by and through its attorneys of record,  
22 the law firm MAIER GUTIERREZ AYON, hereby files this opposition to defendant Wells Fargo  
23 Bank, N.A.'s ("Defendant" or "Wells Fargo") motion to dismiss with prejudice the Plaintiff's  
24 complaint [Dkt. #11] ("Opposition") and countermotion for summary judgment (the  
25 "Countermotion"). This Opposition and Countermotion are made and based on the following

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memorandum of points and authorities, the papers and pleadings on file herein and any oral arguments the Court may entertain.

DATED this 15<sup>th</sup> day of April, 2013.

Respectfully submitted,

**MAIER GUTIERREZ AYON**

*/s/ Luis A. Ayon*

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### **MEMORANDUM OF POINTS AND AUTHORITIES**

#### **I. INTRODUCTION**

This lawsuit involves real property in which the parties do not dispute any of the facts in this case and the central issue before the district court is whether an HOA foreclosure sale extinguishes junior liens such as a first of deed of trust.

Nevada law unequivocally provides homeowner associations in Nevada with an *automatically* perfected lien for unpaid assessments that is *superior* to all other mortgage holders *including* the first deed of trust. Nevada law provides that the failure of a homeowner or anyone else claiming an interest in the subject property to pay homeowner assessments faces the risk of losing the subject property or their security interest by way of a non-judicial foreclosure sale.

Plaintiff purchased the Property at a non-judicial foreclosure sale pursuant to NRS 116.3116, *et seq.*, after defendants failed to take any action to pay the uncollected homeowner assessments. Plaintiff filed this lawsuit to: (1) quiet title against the first deed of trust holder and any other junior lien holders; and (2) enjoin any party from foreclosing on the Property during the duration of this lawsuit. The facts of this lawsuit are uncontested and a determination is ripe to be made as a matter of law. Nevada law, in conjunction with recent governmental opinions, clearly

1 provide that the district court should grant summary judgment in favor of Plaintiff and declare that  
2 an HOA super-priority lien extinguishes all junior liens post foreclosure.

## 3 **II. OPPOSITION TO MOTION TO DISMISS**

### 4 **A. STATEMENT OF FACTS IN OPPOSITION TO MOTION TO DISMISS**

5 For purposes of this opposition to defendant Wells Fargo's motion to dismiss, Plaintiff  
6 adopts the movant's statement of facts and joins in their request for judicial notice [Dkt. #11 and  
7 Dkt. #12].

8 Further, Plaintiff adds that the Property is subject to a set of CC&Rs recorded by the  
9 Elkhorn Community Association ("Elkhorn Community HOA"). *See* Compl. [Dkt. #1] at ¶ 13.  
10 The recording of the CC&Rs by the Meadows HOA was *prior* to defendant Wells Fargo recording  
11 its deed of trust (the "Wells Fargo DOT").

12 Plaintiff acquired the Property on or about March 6, 2012, by successfully bidding on the  
13 Property at a publicly held foreclosure action in accordance with NRS 116.3116, *et seq.* The  
14 foreclosure deed was then recorded in the Official Records of the Clark County Recorder as  
15 Instrument No. 201203160001230 (the "Deed"). *See id.*, at ¶ 4.

16 On or about March 8, 2013, defendant Trustee Corps sold the Property despite a pending  
17 motion to enjoin the foreclosure sale. *See* Proposed Order to Show Cause, which is attached hereto  
18 as **Exhibit "1."**

19 Defendant Trustee Corps removed the case to federal court [Dkt. #1] while the order to  
20 show cause hearing was pending.

21 These above facts are uncontested and undisputed, and for the purposes of this opposition  
22 must be accepted as true. *See Knievel v. ESPN*, 363 F.3d 1068, 1072 (9th Cir. 2005) ("[w]hen  
23 ruling on a motion to dismiss, we accept all factual allegations in the complaint as true and construe  
24 the pleadings in the light most favorable to the nonmoving party"].

### 25 **B. LEGAL ARGUMENT IN OPPOSITION TO MOTION TO DISMISS**

#### 26 **1. Standard of Review for FRCP 12(b)(6) Motion to Dismiss**

27 When a district court dismisses a claim pursuant to a FRCP 12(b)(6) motion, "we evaluate  
28 the complaint de novo to decide whether it states a claim upon which relief could be granted ...."

1 *Gonzales v. Metro. Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999). All factual allegations set  
2 forth in the complaint “are taken as true and construed in the light most favorable to [p]laintiffs.”  
3 *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996).

4 The district court’s review of a FRCP 12(b)(6) motion is limited to the contents of the  
5 complaint. *See Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552 (9th Cir. 1984). If  
6 matters outside the pleadings are submitted, a motion to dismiss under FRCP 12(b)(6) is treated as  
7 one for summary judgment. *See id.* When a FRCP 12(b)(6) motion is converted into one for  
8 summary judgment, the district court must sufficiently inform the nonmoving party of that fact and  
9 afford the nonmoving party a reasonable opportunity to present all pertinent material. *See Garaux*  
10 *v. Pulley*, 739 F.2d 437, 438 (9th Cir. 1984).

## 11 **2. The HOA Assessments Have Priority Over Wells Fargo’s DOT**

12 The creation of a common-interest community is by statute and must be recorded in the  
13 same manner as other interests in real property. *See* NRS 116.2101.

14 NRS 111.320 states that recording an interest in real property is notice to all subsequent  
15 purchasers and mortgagees that they take and purchase with notice of prior liens against the real  
16 property. *See* NRS 111.320.

17 The Nevada legislature enacted NRS 116.3116 to protect Nevada homeowners associations  
18 by ensuring their ability to collect delinquent assessment liens. Pursuant to NRS 116.3116, a  
19 homeowners association (or HOA) has a statutory lien against a unit owner’s real property for  
20 delinquent assessments. The recordation of the HOA’s Declaration of Covenants, Conditions and  
21 Restrictions “constitutes record notice and perfection of the lien.” NRS 116.3116(4). As such,  
22 “[n]o further recordation of any claim of lien for assessments [under 116.3116] is required.” *Id.*

23 In addition to automatic perfection and notice, a lien for delinquent assessments is entitled to  
24 priority over virtually all security interests in the property, including a first recorded deed of trust,  
25 “to the extent of the assessments of common expenses based on the periodic budget adopted by the  
26 Association pursuant to NRS 116.3115 which would have become due in the absence of  
27 acceleration during the nine (9) months immediately preceding institution of an action to enforce  
28 the lien.” *Id.* This lien is frequently referred to as the “Super Priority Lien.”

1 The Super Priority Lien has its genesis in the 1977 Uniform Condominium Act, as amended  
2 in 1980 (the “UCA”). Pursuant to UCA § 3-116, a delinquent assessment lien is “also prior to the  
3 mortgages and deeds of trust described in clause (ii) above to the extent of the common expenses  
4 ...which would have become due in the 6 months immediately preceding the institution of an action  
5 to enforce the lien.” See **Exhibit 2**, UCA, 3-116. The Comments provided with this section are  
6 telling:

7 To ensure prompt and efficient enforcement of the association’s  
8 lien for unpaid assessments, such liens should enjoy statutory  
9 priority over most other liens... A significant departure from  
10 existing practice, the 6 months’ priority for the assessment lien  
11 strikes an equitable balance between the need to enforce  
12 collection of unpaid assessments and the obvious necessity for  
13 protecting the priority of the security interest of mortgage lenders.  
As a practical matter, mortgage lenders will most likely pay the 6  
months’ assessments demanded by the association rather than  
having the association foreclose on the unit ... since this provision  
may conflict with the provision of some state statutes which  
forbid some lending institutions from making loans not secured  
by first priority liens [state law should be consulted].

14 *Id.*

15 This language found its way into the Uniform Planned Community Act in 1980 (the  
16 “UPCA”), drafted by the National Conference of Commissioner of Uniform State Laws. See  
17 **Exhibit 3**, UPCA 3-116. The Super Priority Lien was then included in the 1982 Uniform  
18 Common-Interest Community Ownership Act (“UCIOA”), which was then adopted by the Nevada  
19 legislature in 1991 as the Nevada Uniform Common-Interest Community Ownership Act, NRS  
20 Chapter 116.

21 Pursuant to Nevada law, an HOA is entitled to pursue non-judicial foreclosure of delinquent  
22 assessment liens. NRS §§ 116.31162-116.31168. In order to pursue non-judicial foreclosure, an  
23 HOA is required to mail a copy of the notice of default and election to sell to, among others, “[a]ny  
24 holder of a recorded security interest encumbering the unit’s owner’s interest.” NRS 116.31163(2).  
25 Following the foreclosure sale, the person conducting the sale issues a deed to the purchaser. NRS  
26 116.31164(3). The recitals in this deed regarding “[d]efault, the mailing of the notice of delinquent  
27 assessment, ...the recording of the notice of election to sell ... and the giving notice of sale, are  
28

conclusive proof as to the matters recited.” NRS 116.31166(1)(a)-(c). The deed containing such recitals is “conclusive against the former owner ... and all other persons.” NRS 116.31166(2).

**3. An HOA’s Super priority Lien Cannot Be Waived Or Subordinated By The CC&Rs.**

Defendant argues that its deed of trust was not extinguished by the HOA foreclosure sale because HOA is subordinate based on the CC&Rs. The HOA however, cannot waive its right to a super priority lien in its CC&Rs. Pursuant to NRS 116.1104, the provisions of NRS 116 cannot be waived: “Except as expressly provided in this chapter, its provisions may not be varied by agreement, and rights conferred by it may not be waived.” NRS 116.1104 (emphasis added).

NRS 116.1206 further provides that any provision of an HOA’s CC&Rs that violates the provisions of NRS 116 “shall be deemed to conform” with NRS 116 and “[i]s superseded” by the provisions of NRS 116:

1. Any provision contained in a declaration, bylaw or other governing document of a common-interest community that violates the provisions of this chapter:

(a) Shall be deemed to conform with those provisions by operation of law, and any such declaration, bylaw or other governing document is not required to be amended to conform to those provisions.

(b) Is superseded by the provisions of this chapter, regardless of whether the provision contained in the declaration, bylaw or other governing document became effective before the enactment of the provision of this chapter that is being violated.

2. In the case of amendments to the declaration, bylaws or plats of any common-interest community created before January 1, 1992:

(a) If the result accomplished by the amendment was permitted by law before January 1, 1992, the amendment may be made either in accordance with that law, in which case that law applies to that amendment, or it may be made under this chapter; and

(b) If the result accomplished by the amendment is permitted by this chapter, and was not permitted by law before January 1, 1992, the amendment may be made under this chapter.

Statutory interpretation begins with the plain language of the statute, and “[w]hen the language of a statute is plain and unambiguous, a court should give that language its ordinary

1 meaning and not go behind it.” *City Counsel of Reno v. Reno Newspapers*, 105 Nev. 886, 891, 784  
 2 P. 2d 974, 977 (1989); *see Carson- Tahoe Hosp. v. Bldg. & Constr. Trades*, 122 Nev. 218, 220, 128  
 3 P. 3d 1065, 1066-1067 (1006)(courts should look no further if the words have definite and ordinary  
 4 meaning or it is clear the meaning is not intended); *City of Reno v. Bldg. & Constr. Trades*, 127  
 5 Nev. --,--, 251 P.3d 718, 722 (2011)(“When a statute uses words that have a definite and plain  
 6 meaning, the words will retain that meaning unless it clearly appears that the Legislature did not  
 7 intent such a meaning.”)

8 The language of NRS 116.1104 is clear – the CC&Rs cannot waive the provisions of  
 9 Chapter 116 unless expressly provided for by statute. Plaintiff is unaware of any statutory authority  
 10 allowing the CC&Rs to waive provisions of NRS 116.3116 or the right to a super-priority lien.<sup>[1]</sup>  
 11 Similarly, the language of NRS 116.1206 requires the conflicting provisions of the CC&Rs be  
 12 “deemed to conform: and that they are superseded by NRS 116.3116.

13 In *Boulder Oaks Cmty. Ass’n v. B & J Andrews Enterprises, LLC*, the Nevada Supreme  
 14 Court held that when there are conflicts between CC&Rs and NRS 116, the statute controls and any  
 15 conflicts will not be enforced. 125 Nev. 397, 406, 215, P.3d 27, 32-33 (2009)(“When NRS 116.003  
 16 is read in context with the UCIOA, it is clear that when a term is definite in NRS Chapter 116, the  
 17 statutory definition controls and any definition that conflicts will not be enforced.”) The Court  
 18 explained, “any other reading of the statute would be contrary to the express purpose of NRS  
 19 Chapter 116, which is to ‘make uniform the law with respect to the subject of this chapter among  
 20 states enacting it.’” *Boulder Oaks Comty. Ass’n*, 125 Nev. 397, 406, 215 P.3d 27 at 33 (internal  
 21 citations omitted); *see also Senior Futures, LLC v. Silvestri*, 2004 WL 114456, \*3 (Conn. Super. Ct.  
 22 2004)(unpublished opinion)(holding that [the HOA statute] prohibits any variation of the statute  
 23 even by agreement or waiver).

24 For the CC&Rs to trump NRS 116.3116 and effectively subordinate the HOA’s super  
 25 priority lien, there must be one of two scenarios: either (1) NRS 116 would need to expressly  
 26

27 <sup>[1]</sup> While the HOA may choose not to enforce it rights in any given circumstance, it may not waive them carte blanche in  
 28 the CC&Rs. *See, e.g.* NRS 116.3102 (3)[Effective January 1, 2012] (granting the executive board the right to determine  
 whether to commence an action for violating the CC&Rs depending on the specific facts and circumstances). Here,  
 rather than elect to forego its rights, the HOA chose to act to enforce its statutory super-priority lien.



1 provide for the waiver of the super priority lien or (2) the HOA's CC&Rs would need to have been  
 2 adopted before January 1, 1992 and a waiver of the HOA's lien priority was permitted by law at that  
 3 time. Neither of those scenarios is present here.

4 Defendant does not point to the section of NRS 116 that expressly allows an HOA to waive  
 5 its super-priority lien. Defendant does not allege that the HOA's CC&Rs were adopted before  
 6 January 1, 1992 or that a waiver of the HOA's lien priority was permitted by law at that time. In  
 7 this case, the CC&Rs were adopted in 1995. The CC&Rs in this case simply do not control. Any  
 8 lender who funded a loan and secured it with a deed of trust on a property after January 1, 1992 is  
 9 on notice of the super priority lien and that no agreement in the CC&Rs will subordinate the HOA's  
 10 super-priority lien to a first deed of trust. Accordingly, the HOA foreclosure sale extinguished  
 11 Defendant's first deed of trust, and Defendant's motion to dismiss should be denied.

### 12 **III. COUNTERMOTION FOR SUMMARY JUDGMENT**

#### 13 **A. INTRODUCTION**

14 The following statements of Nevada law are undisputed:

- 15 (i) the Nevada legislature intended that HOAs be vested with
- 16 the power to foreclose on property for unpaid assessments;
- 17 (ii) Nevada is race notice state, which allows superior liens to
- 18 extinguish junior liens;
- 19 (iii) Nevada has a substantial interest in disposition of real
- 20 property, and by operation of law, real property can be
- 21 transferred from one entity to another (*i.e.*, foreclosure
- 22 sales, adverse position, condemnation, etc.) – indeed, recent
- 23 governmental actions are consistent with this public policy;
- 24 (iv) NRS 116.3115 is based on the uniform act, which intended
- 25 for an HOA foreclosure sale to extinguish junior liens, such
- 26 as a first deed of trust; and
- 27
- 28



(v) when the HOA super-priority lien was extended from six to nine months, the drafters of the uniform act expected lenders to pay this assessment rather than lose their lien.

For these reasons as well as the reasons outlined below, the district court has a substantial basis, including authoritative opinions (both based on Nevada law and recent governmental actions) for it to uphold long standing Nevada law and policy that priority of liens is based on race notice.

There is no reason for the district court to allow financial institutions to continue to circumvent an HOA's ability to collect assessments. Without an order from the district court quieting title in favor of Plaintiff, financial institutions will continue to disregard Nevada law and ignore HOA assessments on distressed properties, thereby causing further and substantial harm to Nevada communities.

## **B. LEGAL ARGUMENT**

### ***1. Standard of Review for Summary Judgment***

Summary judgment is required under FRCP 56(c) when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact. *See Tarin v. County of Los Angeles*, 123 F.3d 1259, 1263 (9th Cir. 1997). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). That burden may be met by “‘showing’ – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 325, 106 S.Ct. 2548. Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify facts which show a genuine issue for trial. *See id.* at 323-24, 106 S.Ct. 2548; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

### ***2. The Foreclosure of an HOA Lien Based on Delinquent Assessments Extinguished Wells Fargo’s Junior Lien***

It is well settled that the foreclosure of a superior security interest in real property extinguished all junior interests. *See Brunzell v. Lawyers Title Ins. Corp.*, 101 Nev. 395, 705 P.2d 642 (1985); *Erikson Construction Co. v. Nevada Nat. Bank*, 89 Nev. 350, 352, 513 P.2d 1236, 1238

1 (1973).

2 As set forth above, Nevada law affords a delinquent assessment lien super-priority over the  
3 first deed of trust. Accordingly, the foreclosure of a delinquent assessment lien extinguishes all  
4 junior interests, including a first deed of trust.

5 The Nevada Supreme Court has not directly addressed the issue of the priority of a  
6 delinquent assessment lien over a first deed of trust. However, the Washington Court of Appeals  
7 recently published an opinion that is directly on point. In that case, *Summerhill Village*  
8 *Homeowners Association v. Roughly*, 270 P.3d 639, 166 (Wash. Ct. App. 2012),<sup>1</sup> the court ruled  
9 that an association's foreclosure of its super-priority delinquent assessment lien completely  
10 extinguished a first deed of trust.

11 The *Summerhill* court ruled that when an association initiates a foreclosure sale to enforce  
12 its super-priority lien, the foreclosure sale extinguishes any interest held by a first deed of trust. *See*  
13 *id.* The court explained the legal underpinnings of its ruling in an extremely detailed analysis, an  
14 excerpt of which is as follows:

15 As a general rule, the priority of competing lien claims depends on  
16 the order in which the claims attach to the encumbered property.  
17 One exception to this rule is found in the Washington  
18 Condominium Act (act), which provides that a condominium  
19 association automatically levies an assessment lien against the unit  
20 from the time the assessment is due. The assessment lien has  
21 priority to all other liens and encumbrances, except for a unit's  
22 mortgage recorded before the date the assessment became  
23 delinquent. The act further provides that the association's lien has  
24 priority to a mortgage (including a deed of trust) when the lien is  
25 for assessments that cover common expenses. The reasoning for  
26 this was when drafting the condominium statute, the Washington  
27 legislature expected that, as a practical matter, lenders would most  
28 likely pay the association assessments rather than have the  
association foreclose its lien on the unit and eliminate the lender's  
mortgage lien.

24 *See id.* at 640-41.

25 This expectation demonstrates that while the legislature may not have thought that mortgage

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27 <sup>1</sup> A copy of *Summerhill Village Homeowners Association v. Roughly*, 270 P.3d 639, 166  
28 (Wash. Ct. App. 2012), is attached hereto as **Exhibit "4."**

lenders would allow an assessment lien to foreclose, the intention of the legislature was to motivate the mortgage lender to pay off the assessment lien or have their lien extinguished. *See* Section 5, *supra*.

Moreover, the *Summerhill* court repeatedly recognized that the first deed of trust holder (i) was notified of the HOA's foreclosure action, and (ii) could have taken action to protect its security interest by paying off the assessment lien, but decided to do nothing. *See id.* As the *Summerhill* court observed:

Under the condominium statute, the association's 2008 assessment lien on Roughley's unit had priority over the 2006 MERS deed of trust because the association's lien was for assessments that cover common expenses. MERS was notified of the foreclosure action, but GMAC, as the loan servicer, did not attempt payment of the assessment lien prior to the sheriff's sale, and the sale extinguished the 2006 deed of trust.

*See id.*

This fact led the *Summerhill* court to ultimately conclude that the deed of trust holder showed a "lack of diligence," which for the deed of trust holder meant unexpected consequences.

*See id.*

*Summerhill* is directly on point with this case. The Washington statute upon which the *Summerhill* court based its decision is clearly based upon the Uniform Common Interest Community Ownership Act ("UCIOA"), which is the exact same statute upon which NRS 116.3116 is based.

Under both versions of the statute, an association's lien for common assessments has priority over deeds of trust recorded before the lien arises. *Cf.*, NRS 116.3116(2) with RCW 64.34.362. *See Exhibit 5*, a copy of RCW 64.34.362. As the *Summerhill* court noted, this is often termed "super-priority." *See Summerhill*, 270 P.3d at 640.

Defendants in the present case, just like the mortgagees in *Summerhill*, were provided with notice of the foreclosure sale, yet chose not to take any action whatsoever to protect their interest in the Property.

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1                   3.       ***A First Deed of Trust Surviving a Foreclosure Sale Would Eviscerate the***  
 2                                   ***Intent of NRS 116.3115, et seq.***

3           It is undisputed that the intent of NRS 116.3115, *et seq.*, was to vest a homeowner  
 4 association with the power to foreclose should a homeowner fail to pay homeowner assessments.  
 5 The interplay with NRS 107.080 is such that distressed real property would likely be foreclosed  
 6 upon by a lender pursuant to NRS 107 prior to a homeowner association being able to foreclose  
 7 under NRS 116. The timeframe for a foreclosure under NRS 107 is shorter than the nine months of  
 8 delinquent assessments a homeowner association would wait until taking action under NRS 116  
 9 *then* commencing a foreclosure under NRS 116. *See, e.g.*, NRS 107.080 (the time period for a non-  
 10 judicial foreclosure under NRS 107 is approximately 127 days).

11           Should a first deed of trust survive an HOA foreclosure sale, homeowners associations will  
 12 not have any ability to recover and first mortgage lenders will have absolutely zero incentive to pay  
 13 homeowner assessments on distressed real estate. Allowing lenders to escape this liability will  
 14 cause lenders to continue the practice of sitting idly by and not foreclosing on distressed property.  
 15 This also serves as another disservice to Nevada communities by shifting tax, sewer and  
 16 homeowner assessment obligations to the borrower.<sup>2</sup> In fact, a decision by the homeowner to pay  
 17 the assessments knowing that homeowner associations have no ability to collect these fees from  
 18 banks and lenders, or foreclose, would be a violation of the business judgment rule under applicable  
 19 circumstances. As such, any decision allowing a first deed of trust to encumber the Property *after*  
 20 an HOA foreclosure sale would eviscerate the intent of the Nevada Legislature to vest power to  
 21 Nevada homeowner associations to collect at a minimum nine months of unpaid assessments.

22                   4.       ***The Drafters of the 2009 Amendment to NRS 116.3116 Expected the***  
 23                                   ***lenders to Pay Any Delinquent HOA Assessments Rather than Risk Losing***  
 24                                   ***Their Lien***

25           On October 1, 2009, an amendment by the Nevada Legislature to NRS 116.3116 became  
 26

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27                   <sup>2</sup> For example, even though an HOA can recover nine months of unpaid assessments, the  
 28 homeowner (the borrower; not the bank) is still liable for the uncollected assessments.

1 effective, which extended the enforcement period by homeowner associations of their super-priority  
2 lien from six to nine months. *See Exhibit 6*, legislative history of NRS 116.3116.

3 This amendment was in connection with the Uniform Common Interest Ownership Act (the  
4 “UCIOA”), which was drafted by the National Conference of Commissioners on Uniform State  
5 Laws and was enacted in Nevada and seven other states (Alaska, Colorado, Connecticut, Delaware,  
6 Minnesota, Vermont and West Virginia).

7 The UCIOA applies to residential subdivisions and residential condominium projects that  
8 include common elements. As drafted in the Uniform Act, the super-priority lien converted a  
9 period of six months of delinquent assessments.

10 The drafters of the UCIOA explained the super-priority provision as follows [quoted above  
11 as well in Section 2]:

12 A significant departure from existing practice, the 6 months’  
13 priority for the assessment lien strikes an equitable balance  
14 between the need to enforce collection of unpaid assessments and  
15 the obvious necessity for protecting the priority of the security  
16 interests of the lenders. As a practical matter, secured lenders will  
most likely pay the 6 months’ assessments demanded by the  
association rather than having the association foreclose on the unit.

16 *See id*; *see also* Section 2, *supra*. (Emphasis added).

17 The Nevada Legislature expected that mortgage lenders would protect their interests by  
18 paying off assessment liens rather than having their security interests extinguished by an HOA’s  
19 foreclosure of its super-priority lien for delinquent assessments. *Id*. This is a reasonable conclusion  
20 because it explains why the legislature gave assessment liens a “super-priority” designation. This  
21 also makes good public policy sense, as the only way to ensure that the Associations would be able  
22 to collect on their assessment liens is to give them priority status so that the mortgage lender would  
23 have to pay the assessment lien or face the prospect of having their interest extinguished.

24 In fact, the Nevada Legislature specifically contemplated this result. In 2009, Assembly Bill  
25 No. 361 – the bill that introduced NRS 116.310312 – was presented and ultimately passed and  
26 ratified. Section 3 of the bill provides that “a lien for such maintenance and abatement services has  
27 priority over a first security interest on the unit.” *See Exhibit 7*, Assembly Bill No. 361 as Enrolled  
28 at pg. 1, Section 3 to Legislative Counsel’s Digest. It is clear, to the extent the HOA’s Lien is

1 comprised of changes incurred under NRS 116.310312, the foreclosure of a HOA Lien wiped out  
2 Wells Fargo Banks' deed of trust.

3 **5. The Nevada Department of Business and Industry Real Estate Division has**  
4 **Stated that an HOA Foreclosure Sale Extinguishes a First Deed of Trust**

5 The Department of Business and Industry Real Estate Division recently issued an opinion  
6 with respect to an HOA's super-priority lien and foreclosure sales under NRS 116.3116, *et seq.* The  
7 relevant portions of that opinion are as follows:

8 Having established that the association has a lien on the  
9 unit as described in subsection (1) of NRS 116.3116, we now turn  
10 to subsection (2) to determine the lien's priority in relation to other  
11 liens recorded against the unit. The lien described by NRS  
12 116.3116(1) is what is referred to in subsection (2). Understanding  
13 the priority of the lien is an important consideration for any board  
14 of directors looking to enforce the lien through foreclosure or to  
15 preserve the lien in the event of foreclosure by a first security  
16 interest.

17 NRS 116.3116(2) provides that the association's lien is  
18 prior to all other liens recorded against the unit *except*: liens  
19 recorded against the unit before the declaration; first security  
20 interests (first deeds of trust); and real estate taxes or other  
21 governmental assessments. There is one exception to the  
22 exceptions, so to speak, when it comes to priority of the  
23 association's lien. This exception makes a portion of an  
24 association's lien prior to the first security interest. The portion of  
25 the association's lien given priority status to a first security interest  
26 is what is referred to as the "super priority lien" to distinguish it  
27 from the other portion of the association's lien that is subordinate  
28 to a first security interest.

29 The ramifications of the super priority lien are significant  
30 in light of the fact that superior liens, when foreclosed, remove all  
31 junior liens. An association can foreclose its super priority lien and  
32 the first security interest holder will either pay the super priority  
33 lien amount or lose its security. NRS 116.3116 is found in the  
34 Uniform Act at § 3-116. Nevada adopted the original language  
35 from § 3-116 of the Uniform Act in 1991. From its inception, the  
36 concept of a super priority lien was a novel approach. The Uniform  
37 Act comments to § 3-116 state:

38 [A]s to prior first security interests the association's  
lien does have priority for 6 months' assessments  
based on the periodic budget. A significant  
departure from existing practice, the 6 months'  
priority for the assessment lien strikes an equitable  
balance between the need to enforce collection of  
unpaid assessments and the obvious necessity for



protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. If the lender wishes, an escrow for assessments can be required.

This comment on § 3-116 illustrates the intent to allow for 6 months of assessments to be prior to a first security interest. The reason this was done was to accommodate the association's need to enforce collection of unpaid assessments. The controversy surrounding the super priority lien is in defining its limit. This is an important consideration for an association looking to enforce its lien. There is little benefit to an association if it incurs expenses pursuing unpaid assessments that will be eliminated by an imminent foreclosure of the first security interest. As stated in the comment, it is also likely that the holder of the first security interest will pay the super priority lien amount to avoid foreclosure by the association.

See **Exhibit 6.** (Emphasis added).

As stated above, the lender has obligation to preserve its interest in real property and pay HOA dues if the borrower fails to do so. Without this penalty, a lender can simply ignore any obligation and there would be little benefit to the HOA under NRS 116.3116, *et seq.*

Defendants had an opportunity to pay the HOA dues and failed to do so despite being noticed of the sale. Defendants had an absolute obligation to protect their interest in the Property, but failed to do so.

The recent opinion by the Department of Business and Industry Real Estate Division makes clear that the district court should enter an order quieting title to the property in favor of Plaintiff. Furthermore, the Nevada Supreme Court has held that the Real Estate Division and the Commission for Common Interest Communities and Condominium Hotels ("CCICCH") "are responsible for regulating and administering [NRS Chapter 116]." *Dep't of Bus. & Indus. v. Nev. Ass'n Serv., Inc.*, 128 Nev. Adv. Op. 34, \* 4, --- P.3d --- (2012). The Nevada Supreme Court also noted as follows:

NRS Chapter 116 also addresses the issuance of advisory opinions, stating that "[t]he [Real Estate] Division shall provide by regulation for the filing and prompt disposition of petitions for declaratory orders and advisory opinions as to the applicability or interpretation of: (a) [a]ny provision of [NRS 116] or chapter 116A or 116B of NRS.

*Id.* (emphasis added); see also NRS 116.623(1)(a).

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1           Importantly, the Nevada Supreme Court went on to hold that “the responsibility of  
2 determining which fees may be charged, the maximum amount of such fees, and *whether they*  
3 *maintain a priority*, rests with the Real Estate Division and the CCICCH.” *Nev. Ass’n Serv., Inc.*,  
4 128 Nev. Adv. Op. 34, \* 4 (emphasis added). Additionally, the Nevada Supreme Court has  
5 repeatedly held that courts should attach substantial weight to an administrative body’s  
6 interpretation of statutes it is charged to enforce. *See Folio v. Briggs*, 99 Nev. 30, 33, 656 P.2d 842,  
7 844 (1983) citing *Clark Co. Sch. Dist. V. Local Gov’t*, 90 Nev. 442, 530 P.2d 114 (1974) and *Sierra*  
8 *Pac. Power v. Dep’t of Taxation*, 96 Nev. 295, 607 P.2d 1147 (1980).

9           Because the Real Estate Division is responsible for regulating, administering, and  
10 interpreting Chapter 116 – including priority of liens in that chapter – the Advisory Opinion is  
11 dispositive of the exact legal issue in this matter.

12                       **6.     Allowing a First Deed of Trust to Survive a Foreclosure Sale is an**  
13                       **Unreasonable Restraint on the Alienation of Real Property**

14           Nevada Revised Statute 111.860(1) states:

15                       The Legislature finds and declares that:

- 16                               1.     The public policy of this State favors the  
17                               marketability of real property and the transferability of  
18                               interests in real property free of defects in title or  
19                               unreasonable restraints on the alienation of real property;

20           *See* NRS 111.860(1).

21           It is likely that without the filing of this lawsuit, defendant Wells Fargo would not have  
22 commenced any foreclosure proceedings. A notice of sale was then recorded *after* this lawsuit was  
23 filed. A foreclosure sale could have been held *prior* to Plaintiff purchasing the Property and *prior*  
24 to the filing this lawsuit, which would have caused the Property to be placed back on market.  
25 Defendants chose not to take this course of action.

26           Now, the Property cannot be sold and will remain vacant until the first deed of trust actually  
27 forecloses on the Property or that security is extinguished. The Nevada Supreme Court has  
28 previously held a mortgage is mere security for a debt and a conveyance of real property. *See Orr*  
*vs. Ulyatt*, 23 Nev. 134 (1896). This means the original borrower is still the title owner of the  
Property. Until defendant Wells Fargo acts on its rights to foreclose, the Property will remain with

1 the uninterested homeowner.

2       Unfortunately, this inaction by defendant Wells Fargo is impacting the ability for the  
3 Property to be resold and will continue to be a burden on the other homeowners in that community.  
4 This practice by lenders to wait for years to foreclose is an unreasonable restraint on the alienation  
5 of real property, and the district court should allow an HOA to foreclose on the Property and sell it  
6 free from any junior encumbrance including Wells Fargo's deed of trust.

7 **V. CONCLUSION**

8       Based on the foregoing, plaintiff respectfully requests that the district court deny Wells  
9 Fargo's motion to dismiss, and grant plaintiff's motion for summary judgment.

10       DATED this 15<sup>th</sup> day of April, 2013.

11                               Respectfully submitted,

12                               **MAIER GUTIERREZ AYON**

13                               /s/ *Luis A. Ayon*

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**CERTIFICATE OF SERVICE**

I hereby certify that service of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT, WELLS FARGO BANK, N.A.'s MOTION TO DISMISS WITH PREJUDICE THE PLAINTIFF'S COMPLAINT AND COUNTERMOTION FOR SUMMARY JUDGMENT** was made on this 15<sup>th</sup> day of April, 2013, via the Court's CM/ECF system to the following parties:

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